BOOTH, FRERET & IMLAY, LLC

ATTORNEYS AT LAW

ROBERT M. BOOTH, JR. (1911-1981)
JULIAN P. FRERET (1918-1999)
CHRISTOPHER D. IMLAY

14356 CAPE MAY ROAD
SILVER SPRING, MD 20904-6011
WWW.IMLAYLAW.COM

TELEPHONE: (301) 384-5525
FACSIMILE: (301) 384-6384
CHRIS@IMLAYLAW.COM

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Via U.S. Mail and E-mail
tom.wheeler@fcc.gov
ajit.pai@fcc.gov
mignon.clyburn@fcc.gov
jessica.rosenworcel@fcc.gov
mike.orielly@fcc.gov

Honorable Tom Wheeler, Chairman
Honorable Ajit Pai
Honorable Mignon Clyburn
Honorable Jessica Rosenworcel
Honorable Michael O'Rielly
Federal Communications Commission
445-12th Street, S.W., 8th Floor
Washington, D.C. 20554

Re: RM-11738; Realignment of the 896-901 / 935-940 MHz Band to Create a Private Enterprise Broadband Allocation; Written Ex Parte Presentation, JVCKenwood USA Corporation;

Greetings:

JVCKenwood USA Corporation ("JVCKenwood"), a major manufacturer and developer of communications equipment for, among other purposes, Public Safety and Business, Industrial, and Land Transportation (B/ILT) land mobile communications systems, is aware that there is now on circulation among your offices an item drafted by the Wireless Telecommunications Bureau (WTB) addressing the "*Petition for Rulemaking of the Enterprise Wireless Alliance and Pacific DataVision, Inc.*" [1] That Petition, filed jointly by Pacific Datavision, Inc. and Enterprise Wireless Alliance requests that the Commission commence a rulemaking proceeding, proposing (1) to realign the 896-901/935-940 MHz (900 MHz) band to create therein a "private enterprise broadband allocation" (PEBB); and (2) to assign licenses in that newly allocated, six megahertz[2] PEBB allocation (898-901 and 937-940 MHz) on the basis of one, "240-channel" (sic) license per Major Trading Area (MTA) "to the entity already holding at least fifteen (15) of the twenty (20) geographic licenses in that MTA." The PEBB licensee in each market would be obligated to pay for the relocation of incumbent B/ILT and SMR MTA licensees in the PEBB band to

[1] *See* the *Petition for Rule Making* (the Petition), RM-11738, filed November 17, 2014 by Enterprise Wireless Alliance (EWA) and Pacific DataVision, Inc. (PDV), which are collectively referred to herein as "Petitioners". This Petition was the subject of a Public Notice (the "First Notice"), DA 14-1723, released November 26, 2014.
[2] The proposal is to allocate two paired, three megahertz blocks of spectrum for broadband operation.

equivalent narrowband channels in the remaining four megahertz of spectrum (896-898 and 935-937 MHz). JVCKenwood filed comments and supplemental comments[3] in opposition to this proposal during the respective comment periods of the First and Second Notices.

The following summary of the salient facts of this matter should cause the Commission to dismiss the fatally defective EWA/PDV Petition for Rule Making without further consideration. First and foremost, the Petition is no more than a transparent proposal for a spectrum giveaway, intended single-mindedly to feather the nest of both Petitioners (especially PDV), to the exclusion of all others. The PEBB licensee would be, as Petitioners put it, "in most cases, Pacific DataVision, Inc., which holds large numbers of SMR MTA licenses in almost every MTA in the country."[4] The EWA/PDV proposal would, however, result in a very significant spectrum giveaway to PDV: PDV describes the expansion of 13 existing PDV market-based licenses to cover 2.5 MHz of the spectrum in those markets; the addition of 0.5 MHz through the promotion of PDV's site-based licenses to market-wide status; and the grant of 0.5 MHz in areas where PDV has no site licenses at all. For EWA's part, the proposal includes an exclusive award to EWA of the authority to develop and manage "the initial frequency recommendation process" for those licensees to be relocated from the PEBB allocation, again, to the exclusion of the other frequency advisory committees that now are eligible to do that same work competitively. While most of the filed comments which are opposed to the Petition make reference to the disruption of incumbent licensees (including critical infrastructure licensees) now operating in the 900 MHz Band, few have noted that, upon reallocating the 900 MHz band and creating the proposed six megahertz broadband allocation, the entirety of that allocation should be simply assigned to the holder of "a majority" (but not all) of the individual geographic area licenses in an MTA, which "in most cases" is stated to be PDV.[5] In other markets where there is no "dominant" licensee, Petitioners propose[6] a unique, and apparently mandatory "negotiation process" among all geographic license holders in that MTA (i.e. all *mutually exclusive* entities interested in becoming the PEBB licensee in that MTA) that is somehow supposed to result in a consensus

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[3] See the Public Notice (the "Second Notice"), DA 15-579, released May 13, 2015 in this proceeding. The Second Notice sought comment on a so-called "Supplement" to the Petition filed May 3, 2015 by the Petitioners. This "supplement" contained draft proposed rules that the Petitioners failed to include in the November 17, 2014 Petition. According to the Second Notice, the "supplement" "set forth specific technical rules for operation in the proposed broadband segment, such as emission mask and antenna height and power limits" and as well a proposed "relocation process" for incumbent narrowband licensees at 900 MHz. Other draft proposed rules discuss the conditions under which the PEBB licensee would offer broadband arrangements to requesting entities, and the interference protection that the PEBB licensee must provide to systems operating in the 901-902/940-941 MHz band.

[4] See the Petition, at iii.

[5] The Petition, at page 17, states that "It is expected that PDV will be the PEBB licensee in most MTAs because of the extensive MTA holdings Sprint purchased from the FCC at auction and through subsequent secondary market transactions, which spectrum rights have been purchased by PDV and assigned to it from Sprint following FCC consent to the assignment. There are seven (7) MTAs in which neither PDV nor any other MTA licensee holds at least fifteen (15) of the twenty (20) geographic licenses. There, the Petitioners recommend that all MTA licensees be obligated to negotiate to select the PEBB licensee. This could be accomplished in a number of ways, including by creating a new entity in which all the parties participate, subject, of course, to FCC approval. Because these parties will hold varying numbers of MTA blocks within the market, the process should be designed to motivate all to negotiate in good faith."

[6] *Id*, at 17.

plan with a single nominee emerging as a PEBB licensee.[7] The Petitioners, therefore, propose that the Commission award a single, exclusive license to a broadband service provider through a mechanism that avoids any competitive bidding (or any competition at all) and precludes any opportunity for the filing of a mutually exclusive application to become a PEBB licensee[8] in a given market. Nor is there any opportunity for other entities that might, in the presence of a competitive bidding opportunity, develop a far better business plan to implement a broadband system in this band that does not result in the disruption to incumbent and future narrowband licensees.

Pursuant to Section 309(j) of the Communications Act of 1934, as amended,[9] Congress directed the Commission to use competitive bidding to resolve mutually exclusive license applications for those radio services that do not fall within one of Section 309(j)(2)'s auction exemptions. The Commission has concluded that in non-exempt services, the Commission's authority under the Balanced Budget Act continues to permit it to adopt licensing processes that result in the filing of mutually exclusive applications where the Commission determines that such an approach would serve the public interest.[10] The Commission has determined that applications are "mutually exclusive" if the grant of one application would effectively preclude the grant of one or more of the other applications.[11] Where the Commission receives only one application that is acceptable for filing for a particular license that is otherwise auctionable, there is no mutual exclusivity, and thus no auction. Therefore, mutual exclusivity is established when competing applications for a license are filed. In addition, Section 309(j)(2) sets forth conditions beyond mutual exclusivity that have to be satisfied in order for spectrum to be auctionable.[12] Generally speaking, these conditions subject to auction those services in which the licensee is to receive compensation from subscribers for the use of the spectrum.[13] The Commission has interpreted the 1993 Budget Act's exemptions to refer to what it termed "private services", i.e. those that did not involve the payment of compensation to the licensee by subscribers, but were for internal use.[14]

Petitioners have proposed a licensing scheme for PEBB licenses that would avoid mutually exclusive application filing, and to simply give away broadband licenses in MTAs throughout the United States to the single holder of some (but not all) narrowband geographic area licenses in some markets (thus to assign to PDV large amounts of new spectrum not currently held by PDV which PDV would not have to pay for, *including 40 B/ILT channels in*

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[7] Doubtless, the expectation of the Petitioners is that PDV will be the "consensus" broadband licensee in those markets as well. Market dominance of PDV would of course dictate the inevitable outcome of the "negotiation" process. The entire proposal is illusory.

[8] As the final straw in the anticompetitive proposal of the Petitioners, and so as to ensure that there is no chance of a mutually exclusive PEBB license applicant challenging PDV in any market, the Petitioners have suggested a freeze on applications *across the board* for 900 MHz licenses. If that is done, no entity desirous of competing with PDV for a PEBB license in any market could do so by becoming a licensee in that band.

[9] *See* 47 U.S.C. § 309(j) (1999).

[10] *Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended*; *Report and Order and Further Notice of Proposed Rule Making* 15 FCC Rcd 22709 (2000).

[11] *Implementation of Section 309(j) of the Communications Act -Competitive Bidding (Second Report and Order)*, 9 FCC Rcd 2348 at 2350 n.5 (1994).

[12] *See* 47 U.S.C. § 309(j)(2)(A) (1996).

[13] Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 Title VI, § 6002(a) (1996).

[14] *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348 at 2352, ¶¶ 23-25.

each MTA that are proposed to be reallocated from narrowband use as part of the PEBB broadband allocation). Furthermore, there is no metric proposed for the means of choosing a single licensee in those markets in which PDV does not hold a majority of narrowband licenses. This cannot *possibly* be found to be in the public interest. Assuming *arguendo* that the creation of a broadband allocation in the 900 MHz band is in the public interest in the first place, the Commission should avoid complicity in what amounts to an anticompetitive plan by PDV to acquire large swaths of spectrum in markets throughout the United States free, and without any opportunity for other broadband providers who might be far better qualified to develop and provide broadband service in that band to enter the arena through competitive bidding, and to effectuate as necessary the relocation of displaced narrowband licensees that would be necessary.

Section 309(j) of the Communications Act of 1934, at Subsection 309(j)(3)(D) obligates the Commission to promote the efficient use of the spectrum. The Commission has found that adoption of a licensing scheme that results in the filing of mutually exclusive applications encourages efficient use of the spectrum as mandated by Section 309(j)(3).[15] It unavoidably must reach the same conclusion in this case. The spectrum giveaway proposed by PDV is neither in the public interest nor a fair or equitable means of distributing licenses among the states and communities as called for by Section 307(b) of the Communications Act of 1934.

Had the Petition merely proposed that PDV be permitted to utilize the 900 MHz SMR channels *it has previously aggregated and now holds licenses for in various MTAs*, acquired by purchase (from Sprint after the decommissioning of the Sprint iDEN network) in a broadband configuration, there would be little basis for objection. Indeed, the Commission's Rules [47 C.F.R. § 90.645(h)] now permit combining of up to ten channel blocks where additional bandwidth is required. If PDV wants to acquire licenses by purchase or application sufficient in number in a given MTA to commence a broadband service using those licenses that it holds and those it is able to acquire, the Commission might fairly consider amendment of the Part 90 rules to permit that. That is not, however, what the EWA/PDV Petition proposes. Rather, there is a single beneficiary of this Petition attempting to acquire for its own use varying numbers of channels that it does *not now have licensed to it*[16] without competitors and without any cost other than the obligation to relocate incumbent narrowband licensees from the spectrum it proposes to have given to it. It proposes to use its own licensed spectrum and that proposed to be given to it, and to sell broadband services on a commercial basis using that spectrum to third parties. As an incident to this spectrum grab, Petitioners propose to reduce by 40 channels in each and every MTA in the United States the number of narrowband B/ILT channels that are available for licensing now without any showing of the impact of that on present and future B/ILT needs and without any preclusion study.

There are many reasons why the Commission should reject the PDV/EWA proposal, including the fact that it was defective when filed pursuant to Section 1.401(c) of the

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[15] *See, e.g.*, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10009-10010 ¶ 115 (1997).

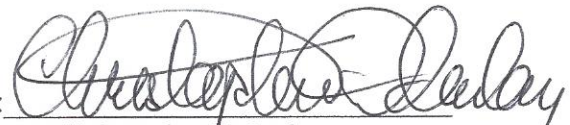
[16] This fact completely differentiates the instant proposal from the 800 MHz rebanding effort. In the latter, there was a compelling interference resolution basis for the process. Here, there is an anticompetitive and monopolistic motive.

Commission's rules, which requires very clearly and specifically that a petition for rulemaking *shall set forth the text or substance of the proposed rule* to be changed. The proposal changed when Petitioners finally filed an Appendix with the proposed rules set forth therein after the comment period had closed in this proceeding. Furthermore, there are unaddressed interference issues with incumbent systems; and the Petition remains defective because it contains no preclusion study or market-by-market analysis of the effect on narrowband licensees and future 900 MHz deployments. However, the most significant reason for the necessary dismissal of the Petition in this case without further action is the fact that the Commission should not permit PDV to be given exclusive access to large amounts of spectrum and a broadband license in all markets in the United States, without competitive bidding.

JVCKenwood respectfully urges that the Commission dismiss or deny this Petition without further action.

Respectfully submitted,

JVCKenwood USA Corporation

By: 

Christopher D. Imlay
JVCKenwood Regulatory Counsel

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